FILE COPY

FILED
APR 30 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 787.

ILLINOIS COMMERCE COMMISSION, ET AL., *Appellants.*

vs.

THE UNITED STATES OF AMERICA, ET AL., *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF OF APPELLANTS.

OTTO KERNER,
Attorney General of Illinois;
IRVIN ROOKS,
HARRY R. BOOTH,
Assistant Attorneys General of Illinois,
Counsel for Illinois Commerce Commission.
PHILIP LUTZ, JR.,
Attorney General of Indiana;
HERBERT J. PATRICK,
Deputy Attorney General of Indiana,
Counsel for Public Service Commission (of Indiana).
HERBERT J. CAMPBELL,
Counsel for Board of Trade of the City of Chicago.
JOHN S. BURCHMORE,
NUEL D. BELNAP,
LUTHER M. WALTER,
Counsel for Acme Steel Company.

April 30, 1934.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Statement	1
The questions	2
Facts relied upon by appellees which are irrelevant	3
The matter of competition between shippers is not now in issue	4
The findings and order of the commission in Docket 24950 furnish no support for the order sought to be enjoined	4
The fact that no effort was made to enjoin the order of July 31, 1931, which was confined to interstate rates is without significance	6
The order of the Commission is not supported by the necessary subordinate findings	7
The order of the commission is not supported by substantial evidence	20
Unjust discrimination does not obtain except where the carrier which maintains the rates alleged to occasion the unjust discrimination is likewise responsible for the rates applied to the traffic which is unjustly discriminated against	29
The order of the Commission is void because it is indefinite and lacks precision in respect to the carriers subject to its terms	31
Nothing is said by appellees which relieves the Commission from the charge of having denied appellants a full and fair hearing	32
Grain switching rates	36
Conclusion	42

CASES CITED.

	Page
Sprunt & Sons v. U. S., 281 U. S., 249	6
Beaumont, S. L. & W. R. Co. v. U. S., 282 U. S., 76, 86	7
Florida v. U. S., 282 U. S., 194	7
Smith v. Illinois Bell Telephone Co., 282 U. S., 133, 151	8, 18, 19, 20
Fifteen Per Cent Case, Ex Parte 103, 191 I. C. C. 361, 370	11
Wisconsin Railroad Commission v. C. B. & Q. R. R. Co., 257 U. S., 563	19, 31
U. S. v. Abilene & S. Ry. Co., 265 U. S., 274	21
Eastern Class Rate Investigation, 164 I. C. C., 314	25
Interstate Commerce Commission v. B. & O. R. R. Co., 145 U. S., 263	29
Texas & Pacific Ry. Co. v. U. S., 289 U. S., 627	29
Missouri-K-T. R. Co. v. Kansas City Terminal Ry. Co., 198 I. C. C. 4	33
A. T. & S. F. Ry. Co. v. U. S., 284 U. S. 248	33
Georgia Public Service Commission v. U. S., 283 U. S., 765, 770	35

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1933

No. 787

ILLINOIS COMMERCE COMMISSION, ET AL, *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL, *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR APPELLANTS

STATEMENT

Two briefs on behalf of the appellees have been filed in this cause, the first being on behalf of the Alton Railroad Company and the other railroad carriers and the second on behalf of the United States and the Interstate Commerce Commission.

Many of the arguments advanced by appellees were anticipated and all necessary reply thereto is contained in the

opening brief for appellants. It is desirable, however, to deal briefly with some of the more outstanding errors of fact and fallacies in argument as presented in the briefs on behalf of appellees. For convenience in referring to the pages on which is contained the matter to which reply is addressed, we indicate the pages of brief in parenthesis and use the symbols (c) when the page reference is to the brief on behalf of the carriers and (u) when the page reference is to the brief on behalf of the United States and the Interstate Commerce Commission. When a statement to which reply is made is contained at several points, as many of them are in the brief of appellees, ordinarily reference will be given to but one place where the statement is found. References to our own brief are indicated by (Br.).

The Questions

Counsel for the United States and the Interstate Commerce Commission say (u. 2-3) that there are four questions in this case, i. e., (1) whether the interstate switching rates established in the *First Report* constituted a valid basis of reasonable rates for use by the Commission in reaching its determination that the carriers' intrastate rates caused unjust discrimination against interstate commerce; (2) whether the Commission's findings of fact were adequate; (3) whether there was substantial evidence to support such findings, and (4) whether the Commission abused its discretion in denying the petition for rehearing based on allegations of changed conditions.

Counsel overlooked that there are three additional important questions before this Court, i. e., (a) whether or not the difference in fact in the amount of service rendered on intrastate traffic, on the one hand, as compared with interstate traffic, on the other, justified the difference between the intrastate and interstate rates; this is a subject with which we dealt on pages 128 to 136 and 156 to 158 of our opening brief; (b) whether or not the order actually em-

braces intrastate rates to be applied for 1-line hauls on railroads which do not operate 1-line in interstate commerce, and, if it embraces such rates, whether or not such an order is a valid exercise by the Commission of its powers; with this latter question we dealt on pages 105 to 107 inclusive of our opening brief; and (c) whether the order in its application to grain switching rates was valid.

FACTS RELIED UPON BY APPELLEES WHICH ARE IRRELEVANT

In support of the Commission's finding which compels the same rates in cents per hundred pounds on intrastate as on interstate traffic, appellees stress and emphasize the fact that some of the shippers who appeared before the Commission requested an all-commodity basis within the Chicago switching district for application alike to intrastate and interstate traffic. (c.10; u.56-7).

The facts stated have no significance or controlling weight in this case. The desire of one or several shippers for a uniform rate basis does not bear upon the question of whether a difference in rates results or does not result in unjust discrimination against interstate commerce. Certainly the Illinois Commerce Commission and the Public Service Commission of Indiana may not be deprived of the powers conferred upon them by statute to determine the reasonableness of intrastate rates because of the desire of one or several shippers for rate uniformity. The Interstate Commerce Commission in making both its finding as to the reasonableness of rates and its finding as to unjust discrimination was by statute required to predicate such findings on evidence as to transportation circumstances and conditions. The Interstate Commerce Commission is not the traffic manager of the railroads and is not empowered to require rates otherwise lawful to be changed because it may believe such a change desirable or beneficial.

If the order of the Commission complained of were otherwise void, it can not be sustained because it meets the

wishes of some, or even all, shippers for a uniform all-commodity basis.

The Matter of Competition Between Shippers Is Not Now in Issue.

On page 12, under the heading "Competition", railroad appellees refer to the location of railroads and industries, with reference to the state line separating the Indiana section from the Illinois section of the Chicago switching district and assert that there is competition between such shippers. But competition between the industries is not now in issue, since the Commission expressly finds (R. 166) that the maintenance of lower intrastate switching rates than those approved for interstate switching

> "has not been shown to have caused or to cause any undue preference and advantage of persons or localities in intrastate commerce, or any undue prejudice and disadvantage to persons or localities in interstate commerce."

The discussion of competition between shippers, therefore, has no part in this case.

The Findings and Order of the Commission In Docket 24950 Furnish No Support For the Order Sought To Be Enjoined.

Shortly after the Commission issued its *First Report* the Acme Steel Company and certain other shippers filed a formal complaint with the Commission under Docket 24950 assailing the increased rates on interstate traffic as unreasonable in violation of section 1 of the Act. The further hearing in Docket 19610 presented the sole issue as to the lawfulness of the relation of rates and charges for switching in intrastate commerce to the rates prescribed for like switching in interstate commerce. (R. 139).

The hearing in Docket 24950 was separate from the further hearing under the section 13 issue in Docket 19610, but proceeded under a ruling from the presiding Examiners that the evidence received in either case might be used in the other, in so far as it was material to the issues contained therein. (R. 943, Tr. 2150.)

It will be noted by reference to our original brief (Br. 74) that every effort made, both by formal motions and by request at the hearing to include in the evidence at that time testimony as to the current costs of switching intrastate and interstate traffic, was unavailing. There were two classes of testimony presented in the formal complaint case: (a) criticism of the cost study as applied in 1926 and 1927 and (b) a showing that the increased rates were prohibitive and resulted in a diminution rather than an increase in income.

The finding made in Docket 24950 was that the interstate rates assailed "are not unjust or unreasonable. The complaint accordingly will be dismissed." (R. 156). The finding made was wholly negative. It was equivalent to a finding that the complaining shippers had not borne the burden of proving that the assailed rates were excessive.

In that case the complaining shippers could do little more than criticize the 1927 study and make comparisons with switching rates in other localities. The latter comparisons were rejected by the Commission on the ground that no actual costs were shown for the compared districts and that the average hauls in the compared districts were not the same as in the Chicago district. (R. 149). The defendants (Railroad appellees) offered no evidence in the complaint case (R. 145). No new cost study was introduced and consequently, in so far as costs which attached to the particular traffic under consideration are concerned, i. e., that switched between points within the Chicago switching district, there is not a single syllable of evidence in the record in Docket 24950 which is new in the sense that it is in addition to the evidence taken at the original hearings in No. 19610.

Consequently, appellees are completely in error in asserting (c. 42) that the hearings had "brought the record down to date with respect to all issues involved including the reasonableness of the interstate switching rates."

THE FACT THAT NO EFFORT WAS MADE TO ENJOIN THE ORDER OF JULY 31, 1931, WHICH WAS CONFINED TO INTERSTATE RATES IS WITHOUT SIGNIFICANCE.

Attention is called (c.32) to the fact that the appellants did not seek to enjoin the order of July 31, 1931, issued in connection with the *First Report*, the thought apparently being that, since no attempt was made to enjoin that order, appellants are now foreclosed from questioning the validity of the finding made in connection therewith as to the reasonableness of the interstate rates. Appellants overlook the fact that the shippers concerned with the interstate rates would have had no standing in any court in a suit to enjoin it. Even if the finding of reasonableness was invalid, the rates could have been made effective by the voluntary act of the carriers and no court could have compelled the Interstate Commerce Commission to restrain the increase on interstate traffic. Compare *Sprunt & Sons* v. *United States*, 281 U. S., 249. The Illinois Commerce Commission and the Public Service Commission of Indiana had no right to complain in court since the scope of the order neither affected intrastate traffic nor interfered with state sovereignty.

However, the fact that the order mentioned could not have been reviewed as it applied to intrastate traffic does not prevent appellants from herein questioning the sufficiency of the finding then made as to the reasonableness of the interstate rates. In this cause a valid and adequate finding as to reasonableness is a necessary prerequisite to the validity of the section 13 order sought to be enjoined.

The point we make is that a valid finding as to the reasonableness of interstate rates is necessary whenever the

Commission enters an order which prescribes the interstate rates as the minima for intrastate traffic. We do not understand that appellees deny that this is a correct statement of the law. Our further point is that the finding as to the reasonableness of the interstate rates is not a valid finding because it was not supported by substantial evidence. That point is covered by pages 108 to 122, inclusive, of our opening brief.

THE ORDER OF THE COMMISSION IS NOT SUPPORTED BY THE NECESSARY SUBORDINATE FINDINGS

In our opening brief at pages 83 to 105, inclusive, we pointed out that in six different and distinct particulars the Commission failed to make subordinate findings which are necessary to support an order entered under section 13 of the Act. Appellees argue (c.63) that the order is properly supported because, under the law, there is no requirement for anything but the conclusion of the Commission, together with its decision, order or requirement in the premises, it being further said that whatever else is contained in the report is there only as a matter of "good practice." Appellees do not correctly state the rule since this Court, in no uncertain terms, has held that complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are the opinions of lower courts setting forth reasons on which they base their decisions, *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S., 74, 86. Precise and specific application of this rule was made in *Florida* v. *United States,* 282 U. S., 194.

Among the subordinate findings which we asserted should have been, but were not, made is a finding that the intrastate traffic upon which the rates subject to the order were assessed is of a like kind and similar to the interstate traffic in respect to the conditions under which switching service is rendered. (Br. 86-9). Appellees take the

position that switching service and switching rates must be dealt with on the average; that it is entirely proper to average state with interstate traffic, and that, consequently, there is no necessity for a specific affirmative finding of the kind above mentioned (c. 72-3).

For the sake of the point under consideration, let us assume that the rates prescribed are proper for the average intrastate and interstate service *combined*. That fact will not support the requirement of an order that the rates shall be the same for intrastate and interstate traffic unless the evidence shows and the Commission finds, that the average service on intrastate traffic is comparable with the average service on interstate traffic.

Initially the power of the Commission to prescribe rates does not extend beyond those applicable to interstate traffic and in the prescription of such rates the Commission must confine its consideration to conditions surrounding such interstate traffic. The State Commissions have exclusive power to regulate intrastate charges unless and until such charges are in violation of section 13 of the Act. In exercising the powers conferred upon them by the respective State statutes the State Commissions must confine their consideration to conditions which surround intrastate traffic.

Let us assume that, proceeding within their respective provinces, the Interstate Commission prescribes a rate of $1.00 because the average interstate service justifies that charge, and the State Commission prescribes a maximum charge of 50 cents because the average service on intrastate traffic justifies such a charge. In such case the Interstate Commerce Commission would have no power to prescribe a charge of 75 cents for intrastate and interstate traffic combined on the ground that such a charge was justified by the average of the two. Intrastate service cannot be burdened with charges due to improper apportionment of property costs. *Smith vs. Ill. Bell Telephone Co.*, 282 U. S., 133-151. In essence, however, that is precisely what the Interstate Commerce Commission has done in this

proceeding, and it has imposed that requirement without making a finding that the average service on interstate traffic is similar to the average service on intrastate traffic. Elsewhere we deal with the proposition that the evidence fails to show a similarity of intrastate to interstate commerce, and in fact shows a dissimilarity in service which fully justifies the difference in rates.

We have also asserted that another necessary finding is that an increase in the intrastate rates will provide additional income for the carriers (Br. 89-95). Appellees make repeated reference to Exhibits 99, 101 and 103, and the comments of the Commission thereon, as being the equivalent of such a finding. (c. 47-8; u. 48-50). The exhibits mentioned consist of the arithmetical application of future rates to traffic which moved in September, 1926, in one week in November, 1931, and in one week of January, 1932, and purport to show that, if the intrastate rates sought had been applied to traffic which moved in the period stated, the carriers would have received greater revenues. In its *Second Report* the Commission observed that if these exhibits purport to deal with prospective revenue, they rest on the assumption that all the intrastate traffic which moved in the past would continue to move at the higher rates, it being further said: "This is not a fair assumption". (195 I. C. C., 117, R. 165).

It is true that on the same page of its *Second Report* the Commission stated that it was "not convinced" that any substantial portion of the traffic moving by rail intrastate would be diverted to other forms of transportation if the rates for interstate traffic were applied thereto, and it is also true that, on page 118 of its *Second Report* (R. 166) the Commission said:

> "the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find."

The statement last quoted is obviously nothing more than a mere conclusion with no indication of the basic facts on which it is predicated, and standing alone will not support the order sought to be enjoined.

In so far as the Commission's lack of conviction as to the substantial diversion to other forms of transportation is concerned, it apparently rests on the following statement (195 I. C. C., 117, R. 165):

> "However, having in mind that the average single-line intrastate haul in Illinois is nearly 15 miles and in Indiana 6.3 miles; that highway traffic conditions in the Chicago district are congested, involving material delays in the movements of trucks; that the differences between the intrastate and interstate rates at present are generally for single-line hauls only $1.50, and $3 after expiration of the emergency increases; and also that a very large proportion of the intrastate traffic is handled in 1-line movements, we are not convinced that any substantial proportion of the traffic now moving by rail intrastate will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied thereto."

In the first place, the Commission makes a serious error in stating "that the average single-line intrastate haul in Illinois is nearly 15 miles." That figure, which the Commission used, was the average haul of the Illinois intrastate cars embraced within the cost study. We showed at page 17 of our original brief that, out of 8,968 cars Illinois 1-line intrastate, only 1,951, or 22 per cent, were embraced in the cost study. At page 36 we show that the average haul on these 1,951 cars was 14.7 miles, but on page 37 of our original brief we show that the average haul on the 7,017, or 78 per cent of Illinois intrastate cars, not embraced in the study, *was only 5.4 miles.* If the Commission had included both the cost-study and non-study cars, the average haul intrastate 1-line would have been 7.4 miles, or less than half what the Commission states in the above

quotation is the average single-line intrastate haul in Illinois.

The Commission next finds (R. 165) as a reason for its lack of conviction, "highway traffic conditions in the Chicago district are congested, involving material delays in the movements of trucks." There is no real evidence of such congestion as results in material delays in the movements of trucks, or impairs the competitive ability of the trucks. This record shows (R. 1140, Tr. 3012) that, since the hearings in the first case closed in 1928, a number of highways have been paved, some have been widened, trucks are more numerous, and competition between trucks is keener.

The Commission correctly stated the fact that the difference between intrastate and interstate rates for single-line hauls is $3.00 per car after expiration of the emergency increases (*Fifteen Per Cent Case, Ex Parte* 103, 191 I. C. C., 361, 370, decided March 7, 1933). The Illinois Commerce Commission permitted the 10 per cent increase in the intrastate rates concurrent with the surcharges authorized by the Interstate Commerce Commission which, by its decision last referred to, continued in effect until and including September 30, 1933.

It will be noted that in its first decision of March 7, 1933, in the *Fifteen Per Cent Case*, the Commission particularly exempted the interstate rates which it had prescribed in the Chicago switching district from the application of any surcharges, which it had authorized for other services and on practically all commodities throughout the nation.

The fourth reason for lack of conviction on the part of the Commission that any substantial portion of the traffic would be diverted to other forms of transportation is that "a very large proportion of the intrastate traffic is handled in 1-line movements." We have never been able to understand definitely what the Commission meant

by this statement. We asked in our petition of August 15, 1933, that the Commission (R. 181) make its order definite and precise as to whether there is to be any increase of the 1-line intrastate rate of those carriers which publish no interstate 1-line rate and have no possible 1-line interstate haul. That motion was denied.

It may be that by the clause last quoted the Commission was indicating its belief that the effect of its section 13 order would not be to increase 1-line charges of carriers which perform no 1-line interstate hauls.

Another finding required to support the order sought to be enjoined is one which defines the interstate commerce being discriminated against and which defines the manner in which the alleged unjust discrimination occurs in fact. (Br. 98-100). Appellees argue (c. 52-53) that this discrimination in fact is shown by two types of exhibits, first an exhibit covering 856 cars which, after the effective date of the increased interstate rates, moved over what the carriers termed unnatural intrastate routes, it being asserted by them that the normal routes were interstate. This is the exhibit on which the Commission comments on pages 112 and 113 of the *Second Report* (R. 160-61) and with which we dealt on pages 42 to 45 of our opening brief.

Regarding this exhibit appellees state (c.49):

> "The record further shows that the switching cost alone was materially greater in handling the car via state routes in order to protect the shipper's request for state movement."

an illustration is given of one car for which it is asserted the cost over the natural interstate route would have been $10.44 while the cost via the alleged unnatural state route was $21.78. Reference to the record (R. 955, Tr. 2193-97), indicates that these allegations of costs were derived from the 1927 study as applied to the 1926 traffic. On cross-examination the witness was pressed to tell the present-day difference in costs as between the alleged natural and unnatural routes, and in reply stated (R. 1025, Tr. 2501):

> "I could not tell you at the present time whether the movement via the red line (intrastate route) is more expensive or more costly to the carriers than via the black route (interstate route)."

And again (R. 1025, Tr. 2503):

> "Aside from the movement of those particular cars via the particular routes, as shown on the map, I did not make any investigation as to cost, character of service, or anything of that kind."

It will be recalled that the Commission in commenting on this exhibit said (R. 161):

> "The record discloses that in some instances these unnatural or intrastate routes are not only shorter but involve less service. On cross-examination it developed that a considerable haul, in several instances amounting to approximately 20 miles, in connection with the so-called natural or interstate routes, could be saved by the use of more advantageously located interchange connections. A number of such movements were pointed out, and in those cases what was the natural haul over an interstate route would become the shorter haul via an intrastate route, and would involve the most economical movement."

This comment of the Commission is certainly not a finding as to unjust discrimination in fact.

The second item of evidence which it is asserted shows discrimination against interstate commerce is contained in the exhibits giving ratios and percentages of interstate and intrastate traffic to the entire traffic prior and subsequent to the increase in the interstate rates on December 10, 1931. These exhibits are summarized and commented upon on pages 40 to 41 and 122 to 125 of our opening brief, and show for the composite of 1-, 2- and 3-line hauls that prior to the increase the interstate traffic constituted 57.53 per cent of the whole, while subsequent thereto it constituted only 53.25 per cent of the whole. Counsel for ap-

pellees imply that the effect of these exhibits is to show an increase in intrastate traffic at the expense of interstate traffic. (c.15; u.21).

In this connection, and before treating specifically of these figures which deal with November, 1931, prior to the increase, and January, 1932, subsequent to the increase, we call attention to the fact that of the traffic moved in September, 1926, in the Chicago switching district, 40.29 per cent was interstate traffic, which is substantially less than the percentage of either November or January shipments referred to. However, the witness who introduced the exhibit on cross-examination stated (R. 1021, Tr. 2485-6):

> "I have no information in my possession to give the Commission from which it could find that business that moved interstate had been lost to somebody intrastate by reason of this rate situation. * * * We make no contention as to that as a basis for setting aside the lawfully constituted rates of the State of Illinois and the State of Indiana."

The mere statement by the Commission of the percentages claimed is not the equivalent of a finding that the disparity between intrastate and interstate rates resulted in a diversion from and a discrimination against interstate traffic. Yet, other than the comments of the Commission on the exhibits above mentioned appellees fail to direct the attention of the Court to any statement in the *Second Report* which even slants at being a finding which defines the unjust discrimination in fact.

As bearing on this question of diversion from interstate to intrastate traffic, appellees' brief (c.16) points out that prior to the effective date of the increased interstate rates, interstate traffic moving within the district was 57.53 per cent of the whole, and subsequent to the increase in rates was 53.25 per cent; and that between Chicago Heights and the Chicago switching district, prior to the effective date of

the increased interstate rates interstate traffic was 47.07 per cent and subsequent was 28.62 per cent.

It is argued that these reductions in percentage of interstate traffic was due to a change of routing by the shippers whereby what moved via an interstate route prior to the increase in interstate rates thereafter moved by an intrastate rail route. Inasmuch as the greatest change took place in the movement between Chicago Heights and the district, we have analyzed for the purpose of this argument, Exhibits 102, 104 and 106, which show the commodities moving during the week of November, 1931, and the week in January, 1932, in 2-line and 3-line hauls. There were no 1-line hauls between Chicago Heights and the district as the Chicago Heights Terminal Transfer Company which serves practically all of the industries, does not reach the District with its own rails but only in connection with other carriers. There were no 4-line hauls in interstate service between Chicago Heights and the District, and therefore the following table is limited to 2-line hauls and 3-line hauls.

The following table shows all of the commodities which moved in 2-line hauls and in 3-line hauls during the two periods of one week referred to:

Commodity		Intrastate-Illinois		Interstate	
No.	Name	1931 (Exh. 102)	1932 (Exh. 104)	1931 (Exh. 106)	1932 (Exh. 106)
	Two-Line Hauls				
35	Clay, Gravel, Sand and Stone	4	2	—	—
37	Asphaltum	—	—	8	6
45	Refined Petroleum and Its Products	—	—	13	12
49	Iron, Pig and Bloom	—	4	—	—
51	Bar and Sheet Iron, Structural Iron and Pipe	3	2	1	1
66	Chemicals and Explosives	—	—	1	—
69	Other Manufactures and Miscellaneous	—	—	1	2
	Total	7	8	24	21

Three-Line Hauls

16	Other Products of Agriculture	4	1	1	1
31	Coke	—	—	1	—
45	Refined Petroleum and Its Products	1	3	—	—
49	Iron, Pig and Bloom	—	6	—	—
50	Rails and Fastenings	—	1	—	—
51	Bar and Sheet Iron, Structural Iron and Pipe	6	5	9	3
56	Lime and Plaster	—	1	—	—
58	Agricultural Implements and Vehicles	—	1	—	—
66	Chemicals and Explosives	3	5	—	—
69	Other Manufactures and Miscellaneous	17	9	13	2
	Total	31	32	24	6

From the foregoing table it appears that there was no 2-line movement interstate of clay, gravel, sand or stone either in the November or January week and that the intrastate cars decreased from 4 in November to 2 in January. There were no 2-line hauls of asphaltum and refined petroleum and its products intrastate in either week but interstate there was a decrease from 8 cars of asphaltum to 6 cars. The 13 cars interstate in November of refined petroleum and its products decreased to 12 cars in January. Since neither of these commodities moved intrastate in either period there was no diversion to intrastate traffic. A similar situation is revealed as to chemicals and explosives and "other manufactures and miscellaneous," as there was no movement intrastate in either week. Interstate there was one car each under these classifications in November, 1931, while in January there was no movement of chemicals and explosives, but there were two cars of "other manufactures and miscellaneous."

Here we have in the aggregate 2-line hauls an increase in the intrastate of 14 per cent and a decrease in interstate of 12.5 per cent. Yet this analysis shows that there was no diversion of any sort, kind or description of interstate traffic in November, 1931 to intrastate in January, 1932.

Turning now to 3-line hauls: of the 3-line hauls of bar and sheet iron, structural iron and iron pipe, 9 cars were handled interstate and 6 cars Illinois intrastate during the November week. In the January week the interstate movement dropped off from 9 cars to 3 cars, while the intrastate movement dropped off from 6 cars to 5 cars. Certainly there is no room for complaint that the 6-car decrease in interstate was due to a diversion to a rail intrastate route.

To pursue the illustration further, "other manufactures and miscellaneous" in the November week were 17 cars Illinois intrastate and 13 interstate; in January there were only 9 cars intrastate and 2 cars interstate. There was no movement of the following articles during either the November or January week, interstate: Refined petroleum and its products, pig iron and bloom, rails and fastenings, lime and plaster, agricultural implements and vehicles, chemicals and explosives; each of these items had a movement intrastate in either November and/or January. Of these items just named, none of which moved interstate in either week, we find that intrastate refined petroleum and its products increased from 1 car in November to 3 cars in January. No intrastate pig iron or bloom moved in November and 6 cars moved in January. No rails and fastenings moved intrastate in November and 1 car moved in January. No intrastate cars of lime and plaster, or agricultural implements and vehicles moved in November but there was a movement of 1 car of each of these commodities in January. Intrastate chemicals and explosives increased from 3 cars in November to 5 cars in January. Of the total intrastate increase in these various commodities amounting to 13 cars, or more than 300 per cent, not one of them had moved interstate in November, 1931, when the rates were the same intrastate and interstate, and therefore if cannot be contended there was any diversion from interstate rail routes to intrastate rail routes.

The summary of the movement for all of the 3-line hauls shown in the exhibit indicates an increase of 1 car intrastate

in January over the intrastate movement in November, and a decrease of 18 cars interstate in January as compared with the November week. The percentage decrease in the interstate January week under November is 75 per cent and yet our analysis shows that in no case was there a diversion from the interstate to the intrastate rail route.

Here is a clear demonstration of the necessity for analyzing the individual commodities in order to determine whether there was any actual diversion from the interstate route to a rail route. A mere statement of changes in percentages proves nothing.

In this connection we ask particular attention to the fact that many shippers, who testified in the first hearing prophesied that an increase in rate would result in a diversion to competing forms of transportation. We insist that the exhibits above referred to showing a decrease in percentage of interstate traffic in the week of January, 1932, as compared with the week of November, 1931, is complete confirmation of the above prophesy.

We have asserted that, in order to support the order, the Commission should have made a finding showing separately for interstate traffic the property used, revenues, and expenses, and like information for intrastate traffic so as to make it possible to compare revenues with costs for intrastate switching traffic considered separately from interstate switching traffic. (Br. 100-2.)

Appellees give two reasons (c.54-7) in support of their argument that this was not necessary: First, that some of the shippers desire a uniform all-commodity basis. The right of the State Commissions to regulate intrastate rates can not, however, be subordinated to the desires of a few shippers.

Secondly, appellees argue that *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S., 133, has no application in connection with this point because that was a confiscation case and did not deal with discrimination against interstate

commerce. We cited and quoted from the case mentioned at page 101 of our opening brief.

The case is squarely in point because this Court there stated that a separation of intrastate and interstate property, revenues and expenses of a public utility "is essential to the appropriate recognition of the competent governmental authority in each field of regulation." This case raises the question of what authority shall be recognized in regulating intrastate charges in the Chicago switching district. There is a conflict in respect to this matter between the Illinois Commerce Commission and the Public Service Commission of Indiana, on the one hand, and the Interstate Commerce Commission, on the other. The Interstate Commerce Commission has sought to invade the field of state regulation and has directly rested its orders on the relation of revenues to costs for the traffic involved. In dealing with that relation the Interstate Commerce Commission has not, however, separated the intrastate traffic from the interstate traffic but has combined the two. In so doing it has failed to observe the principle enunciated by this Court in *Smith v. Illinois Bell Telephone Company, supra,* a principle which has apt application in any case where the question is as to the division of the field of regulation between Federal and State authorities.

Nothing contrary to what we have just said is found in *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S., 563, from which the railroad appellees quote at page 59 of their brief. In that case this Court sustained an order of the Commission requiring the intrastate passenger fares in Wisconsin to be made the same, *mile for mile*, as the interstate fares. The order was sustained as being a proper exercise of the power of the Commission under section 13 (4) of the Act as well as under section 15a. In discussing the valuation required for the purposes of section 15a to be ascertained pursuant to section 19a, this Court held that it was not necessary for the Commission to value separately

the property used in the intrastate and interstate service, resting its construction on the language of section 15a. As stated, that was a mileage scale case. To have valued each mile of road in proportion to use and then to have prescribed rates which would have produced a like return on intrastate and interstate commerce, was, in the type of case under consideration, obviously unnecessary. The same result is achieved by prescribing the same rates, mile for mile, on intrastate as on interstate traffic.

In the instant case, however, we have an entirely different type of case. All of the findings in the order complained of are supported, if they are supported at all, by a cost study. The unjust discrimination alleged to exist obtains, if it obtains at all, because the relation of revenue to costs on intrastate traffic is different than it is on interstate traffic. In such case, where the primary foundation for all orders is in an ascertainable relation of revenue to cost, there is no escape from the proposition that the Interstate Commerce Commission does not have the right to invade the field of regulation theretofore occupied by the respective states unless it is able to and does find that the relation of revenue to costs is different on intrastate traffic than on interstate traffic. Necessarily, therefore, the principle of *Smith* v. *Illinois Bell Telephone Company, supra,* is controlling.

The Order of the Commission Is not Supported by Substantial Evidence.

It can not be denied that a finding as to the reasonableness of the interstate rates is a necessary prerequisite to a section 13 order if such interstate rates are to be prescribed as the minimum rate on intrastate traffic. We have asserted that the finding made by the Commission as to the reasonableness of interstate rates is not supported by substantial evidence (Br. 109-122).

If there is any evidence to support that finding, it must

be either in the cost study or in the comparisons with line-haul rates to which the Commission referred on pages 709 and 710 of its *First Report* (R. 73-4).

In so far as comparisons of line-haul rates are concerned, they are relied upon by the appellees as constituting evidence. (u.13). We have argued that such comparisons of line-haul rates were not introduced in evidence and on the authority of *United States* v. *Abilene & S. Ry. Co.*, 265 U. S., 274, can not be treated as evidence in support of the order. Appellees have no answer to this point, ignoring it in their briefs.

In so far as the cost study is concerned, we have commented upon the inaccuracies and the defects therein which caused the Commission itself in its *First Report* to find (177 I. C. C., 705, R. 69):

> "We can not, however, accept the cost study as a definite yardstick by which alone to measure the reasonableness of the rates under consideration."

Appellees make no attempt to explain how the cost study can possibly be relied upon in the light of its rejection by the Commission. That the cost study was properly rejected by the Commission is made abundantly plain by our analysis of some of its more outstanding defects at pages 11 to 27 and 109 to 117 of our opening brief. Appellees make no attempt to reply to what is there said.

Counsel for the United States and the Commission do call to the attention of the ~~court~~ (u.33) that at the first hearings the carriers were advised by the Commission that the responsibility for a representative cost study rested with them and that they assumed the risk of not having such a representative study.

If the cost study be representative it must be because the cost of carriage on the 20 roads not included within the study was substantially the same as on the 15 roads included within the study. It must appear that for these two groups of carriers substantially the same quantity of

switching service was necessarily rendered in making an average 1-line, an average 2-line or an average 3-line haul. The briefs of appellants can be searched in vain for any reference to *evidence* which even purports to show that there was this similarity between the 15 study roads and the 20 non-study roads. Our point goes far beyond the contention that the inclusion of the Elgin, Joliet & Eastern which, generally speaking, operates largely outside of the district, and the exclusion of the Chicago Junction, which in number of cars handled is one of the most important lines wholly within the district, rendered the study non-representative. Our basic contention is that there is no proof tending to show that the services of the 20 non-study roads were similar to the services on the 15 study roads.

As bearing on the representative character of the lines embraced in the study we call attention to the fact that Exhibit No. 13 shows that of the 11,950 study cars 1-line the following carriers had a total of 312 cars, made up of Chicago, Burlington & Quincy, 30; Chicago, Milwaukee & St. Paul, 64; Chicago & North Western, 40; Chicago, Rock Island & Pacific, 79; Illinois Central, 99. The Elgin, Joliet & Eastern had in the costs study 6,854 cars, involving a movement outside the district.

There were 5 cost study lines, viz: Illinois Northern; Chicago, West Pullman & Southern; Pullman Railroad; Chicago Short Line; and Chicago & Illinois Western, that had no 1-line cars in the cost study. In the face of this fact, how can it be contended that the Chicago Junction, with its 1,778 intrastate 1-line cars, as appears from Exhibit 9 should not have been included in the cost study. The carriers included 10 railroads in the cost study having in the aggregate only 312 intrastate 1-line cars. There were only 1,951 Illinois intrastate 1-line cars in the study. Deducting the 312 cars of the five trunk lines above named we have 1,639 cars 1-line for all other cost study lines,

which is less than the Chicago Junction 1-line cars that were not included in the cost study.

The vice of using a cost study on only 15 roads while revenues on 35 were under consideration is emphasized by the reference of appellees (u.12) to a table contained in the *First Report* (R. 54) in which the Commission purports to show that the ratio of operating expenses to weighted average revenues under the existing rates was 93.14 per cent for 1-line hauls, 92.83 per cent for 2-line hauls, and 86.51 per cent for 3-line hauls. Corresponding ratios shown under the carriers' proposed rates are 77.55 per cent, 63.77 per cent, and 65.62 per cent. Following the table the Commission states (R. 54):

> "It is quite evident from the high ratios of operating expenses to the revenues that the present rates are too low."

We directed attention to this table on page 25 of our opening brief, pointing out that it involved a comparison of revenues on study and non-study cars combined with costs developed for study cars alone. *This is not a comparison of like with like.* There is no evidence at all in the record which even purports to show that the cost of transporting non-study cars was the same as the cost of transporting the study cars. The Commission did not have before it any evidence as to the true operating ratio in respect to study and non-study cars combined. Consequently, the finding quoted by appellants is wholly unsupported by the evidence.

In discussing the cost study, appellees assert that at the further hearing in the section 13 case it was shown that unit costs had increased since the cost study was made (c.18; u.18). The evidence mentioned is commented upon by the Commission in that portion of its *Second Report* dealing with the formal complaint, Docket 24950, and purports to show that the total operating expenses per car for the eight switching carriers included within the 1927 study had increased from $3.86 in 1928 to $4.04 in 1931 (195 I. C.

C., 98, R. 146). At the same place the Commission mentions a reduction for 1931 as compared with 1928 in operating revenues which exceeded the reduction in operating expenses. Reference is also made to the increased operating ratios, 1931 over 1928.

This evidence had absolutely nothing to do with the cost study and did not pertain to the same traffic as was involved in the cost study. It related to all traffic handled of which the traffic switched locally within the Chicago switching district constituted a minor portion. Intradistrict switching constitute only about 5 per cent of the total operations, says the commission (R. 50). The evidence did not have the effect of showing the trend of present-day costs on switching traffic. Obviously, if the costs stated did apply to switching traffic, being only $4.04 per car in 1931, the rates prescribed by the Commission, of which the lowest was 3 cents per hundred pounds, minimum 60,000 pounds or $18.00 per car, would be wholly out of line and extortionate.

One of the most important points in this case involves the question of whether or not the intrastate traffic subject to the order is of a like kind and similar to the interstate traffic in respect to the amount of switching service and the conditions under which the same is rendered. On behalf of appellees it is said (c.46) that the intrastate and interstate traffic is handled in the same trains and that this constituted a sufficient showing of similarity of conditions. Reference is made (u.54) to the finding of the Commission in the *First Report* (R. 75) that "the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements," and to the finding in the *Second Report* (R. 166) (c. 51) that "the transportation conditions throughout the Chicago switching district are substantially similar."

The statements just quoted are glittering generalities and mean nothing when a particular transportation service is under consideration.

If distance and other circumstances to which we later call attention are disregarded, it is unquestionably true that transportation conditions on the north side of Chicago are very much the same as on the south side of Chicago as well as very much the same as they are in the Indiana portion of the district. It is likewise true that carload traffic from Chicago to Michigan City, Ind., is handled in the same trains and by the same crews as carload traffic from Chicago to New York City, N. Y. It is likewise true that conditions generally throughout the area between Chicago and New York, Michigan City being intermediate, are substantially similar.*

The facts just stated, however, fall far short of justifying the prescription of a Chicago-New York rate as the minimum rate on Chicago-Michigan City traffic. Nevertheless, differing only in degree, that is exactly what the Commission has done in the instant proceeding.

It will be noted that the Commission made no finding that the *quantity of service* rendered on intrastate traffic was the same as the *quantity of service* rendered on interstate traffic. Consequently, when counsel for railroad appellees state (c.10):

> "The evidence before the Commission showed that the services rendered in performing intrastate switching and in performing interstate switching within the district are alike and of the same character."

they make a gratuitous statement and without support in the record.

On page 11 of the brief counsel for railroad appellees assert that the appellants admitted that there is no distinction in the district in the handling of state and interstate traffic. The admission referred to went only to the point, which never has been denied, that in a given transfer train will be found both state and interstate traffic. That is not

*In the *Eastern Class Rate Investigation*, 164 I. C. C., 314, the Commission prescribed a common level of mileage scale rates over this entire territory.

to say, however, that the aggregate of the transfer services, classification services and industrial switching services on intrastate traffic are as great as the aggregate of the services on the interstate traffic. Since the carriers failed to develop costs on intrastate traffic separately from those on interstate traffic it is impossible from evidence in this record to tell how the aggregate of such services does compare, except as may be measured by the matter of average distance of haul. The carrier appellees assert (c.19) that the element of distance "as exampled in the transfer service" is unimportant and in support of this they state:

> "The record shows, by computations from Exhibits 90 and 91, that of the four railroads in the Chicago switching district that cross the state line, namely, the Baltimore & Ohio Chicago Terminal Ry.; Elgin, Joliet & Eastern Ry.; Indiana Harbor Belt Ry.; and the Pennsylvania Railroad—all four of which were used in the cost study—on interstate traffic, the weighted average number of elements of service composing an index number* was 14; similarly, the average number of elements of service composing an index number on Illinois intrastate traffic was 13.7; and on Indiana intrastate movements, the average number of elements of service composing an index number was 12.4. Or, stated in another way, using the interstate elements of service composing an index number of 100 per cent, Illinois intrastate represents 97.9 per cent and Indiana, 88.6 per cent.

The figures stated can not be checked by us except after an elaborate and detailed computation for which time does not permit. Even if the computations were accurate, they add nothing to the record. We are concerned with services on 35 railroads. The computation made is confined to four.

---

*All cars moving over a certain route normally receive the same elements of service peculiar to that route. The total cost per car of all elements of service embraced in a given route are combined under an index number. Or, stated in another way, all different services rendered in furnishing transportation from one industry to another, within the district, are combined under one index number for each railroad."

What the situation is on other lines is not disclosed. Furthermore, a mere comparison of the number of elements of service means nothing. Each different element carries a different cost and it may well be that the average of 13.7 different elements on Illinois intrastate traffic produces an aggregate cost very substantially less than the average of 14 different elements of service for interstate traffic.

Furthermore, even as computed, the averages could not possibly be *weighted* averages because there is no showing in the record as to the number of cars to which each index number attached. Without information as to the number of cars, a weighted average could not be computed.

The only possible yardstick which the record affords us for comparing average quantity of service performed on intrastate traffic with the average quantity of service performed on interstate traffic is in the matter of distance and the relation of distance to revenue, with which we dealt on pages 36 to 39, 128 to 136, and 156 to 158 of our opening brief. It is there shown, for example, that on 1-line traffic the average hauls are Illinois intrastate 7.4 miles, Indiana intrastate 6.1 miles, and interstate 15.3 miles. Although appellees assert that the matter of distance is not controlling, there can be no escape from the conclusion that these differences in distance do have a material effect on the matter of relative cost, even though the precise amount of the difference in cost can not be determined. For example, it goes without question that the following elements of cost in switching services are necessarily affected by distance:

(a) The cost of building and maintaining the roadbed;

(b) The cost of maintaining equipment since the wear and tear in a 15-mile haul is certainly greater than in a 7-mile haul;

(c) The cost of fuel and lubrication and the wages of the train and engine crew are certainly affected by distance because of the additional time necessary to perform the longer haul. It is impossible to believe that it takes a train

going 7 miles as long to get to its destination as it does a train going to a destination 15 miles distant.

(d) In addition to costs of the car above described, there are unquestionably more classification services and intermediate switching performed on hauls which average 15 miles than on hauls which average 7 miles. Exhibit 33 diagrams movements between various points in the Chicago switching district and makes it clearly apparent that, as the length of the haul increases, there is a like increase in the number of yards through which the movement must be made. This necessarily increases the number of transfer movements, as well as the number of classification services and, consequently, it can not, in truth, be said that a difference in the length of haul affects only the costs which attach to transfer service.

Nor is the cost of transfer considered alone an insignificant item.

In Exhibit No. 13, page 38, it is shown in the analysis of switching service and costs for 1-line hauls, according to elements of service, that the average classification of loaded cars and of the empty cars before loading and after unloading aggregates $2.57, while the transfer service of the loaded cars and empty cars before loading and after unloading, aggregates $3.33. Similarly, for 2-line switching service a cost is shown on page 39 of the same exhibit of total classification of loaded and empty cars of $2.98, while the total transfer movement is $3.58. Similarly, on 3-or-more-line hauls, as appears from page 40 of the same exhibit, the total classification service of the loaded and empty car is $3.32, while the total transfer service is $3.93 per car.

This showing clearly indicates that the transfer of the car, which is the particular element of cost responding to differences in distance, exceeds the cost of the classification of the empty car prior to loading, of the loaded car, and of the empty car after unloading. These excess costs of

transfer over classification are shown for both state and interstate combined. There is no showing in the record separating the one from the other.

On pages 131 and 132 of our opening brief we quote from the *First* and *Second Reports* of the Commission to show that the Commission itself in this very proceeding and at four distinct places, treated differences in distance as of controlling importance, except in the one instance of comparing the average intrastate with the average interstate haul.

In their brief in this proceeding (u.37) counsel for the United States and the Interstate Commerce Commission suggest that a difference in average hauls as between two switching districts renders a rate comparison valueless.

Likewise, the difference in average hauls as between intrastate and interstate traffic sufficiently differentiated the service as to justify the application of different rates thereon. As this Court said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 145 U. S., 253:

> "Any fact which produces an inequality of conditions and change of circumstances justifies an inequality of charge."

See, in this connection, the dissenting opinion of Chairman Farrell and Commissioner Aitchison (R. 167).

UNJUST DISCRIMINATION DOES NOT OBTAIN EXCEPT WHERE THE CARRIER WHICH MAINTAINS THE RATES ALLEGED TO OCCASION THE UNJUST DISCRIMINATION IS LIKEWISE RESPONSIBLE FOR THE RATES APPLIED TO THE TRAFFIC WHICH IS UNJUSTLY DISCRIMINATED AGAINST.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S., 627, this Court held that in order to constitute discrimination within the purview of section 3 of the Act, there must be a common control and responsibility for both the prejudicial and preferential rates. Appellees argue (u.61-2) that the principle is not applicable here on the ground that

going 7 miles as long to get to its destination as it does a train going to a destination 15 miles distant.

(d) In addition to costs of the car above described, there are unquestionably more classification services and intermediate switching performed on hauls which average 15 miles than on hauls which average 7 miles. Exhibit 33 diagrams movements between various points in the Chicago switching district and makes it clearly apparent that, as the length of the haul increases, there is a like increase in the number of yards through which the movement must be made. This necessarily increases the number of transfer movements, as well as the number of classification services and, consequently, it can not, in truth, be said that a difference in the length of haul affects only the costs which attach to transfer service.

Nor is the cost of transfer considered alone an insignificant item.

In Exhibit No. 13, page 38, it is shown in the analysis of switching service and costs for 1-line hauls, according to elements of service, that the average classification of loaded cars and of the empty cars before loading and after unloading aggregates $2.57, while the transfer service of the loaded cars and empty cars before loading and after unloading, aggregates $3.33. Similarly, for 2-line switching service a cost is shown on page 39 of the same exhibit of total classification of loaded and empty cars of $2.98, while the total transfer movement is $3.58. Similarly, on 3-or-more-line hauls, as appears from page 40 of the same exhibit, the total classification service of the loaded and empty car is $3.32, while the total transfer service is $3.93 per car.

This showing clearly indicates that the transfer of the car, which is the particular element of cost responding to differences in distance, exceeds the cost of the classification of the empty car prior to loading, of the loaded car, and of the empty car after unloading. These excess costs of

transfer over classification are shown for both state and interstate combined. There is no showing in the record separating the one from the other.

On pages 131 and 132 of our opening brief we quote from the *First* and *Second Reports* of the Commission to show that the Commission itself in this very proceeding and at four distinct places, treated differences in distance as of controlling importance, except in the one instance of comparing the average intrastate with the average interstate haul.

In their brief in this proceeding (u.37) counsel for the United States and the Interstate Commerce Commission suggest that a difference in average hauls as between two switching districts renders a rate comparison valueless.

Likewise, the difference in average hauls as between intrastate and interstate traffic sufficiently differentiated the service as to justify the application of different rates thereon. As this Court said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 145 U. S., 253:

> "Any fact which produces an inequality of conditions and change of circumstances justifies an inequality of charge."

See, in this connection, the dissenting opinion of Chairman Farrell and Commissioner Aitchison (R. 167).

UNJUST DISCRIMINATION DOES NOT OBTAIN EXCEPT WHERE THE CARRIER WHICH MAINTAINS THE RATES ALLEGED TO OCCASION THE UNJUST DISCRIMINATION IS LIKEWISE RESPONSIBLE FOR THE RATES APPLIED TO THE TRAFFIC WHICH IS UNJUSTLY DISCRIMINATED AGAINST.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S., 627, this Court held that in order to constitute discrimination within the purview of section 3 of the Act, there must be a common control and responsibility for both the prejudicial and preferential rates. Appellees argue (u.61-2) that the principle is not applicable here on the ground that

the carriers are only nominal defendants and that the real source of responsibility for the preference and discrimination is in the state authorities.

Even though the intrastate rates were held in effect by orders of the State Commissions, the order complained of herein is directed to the carriers individually in so far as they may participate in the traffic involved. No matter what may have been the cause of the difference between the state and interstate rates, there is no room for a finding of unjust discrimination unless the carrier which maintains the charge alleged to occasion discrimination also maintains the charge on the traffic which it is alleged is discriminated against. The fact that the carriers are willing to respond to a section 13 order does not give it any greater validity than it would have if the carriers were opposed to it. The Commission can exercise only the powers conferred by Congress and those powers can not be enlarged by agreement of some of the parties before it.

If in this case the Chicago & North Western Railway were resisting the order as applied to its 1-line hauls, this Court, following the *Texas & Pacific Case*, would have to hold that the Commission had exceeded its power on the ground that the Chicago & North Western can not discriminate against traffic which it does not handle and upon which are maintained rates which the Chicago & North Western does not control. Only in this respect does the order of the Commission authorize the Chicago & North Western to increase its 1-line intrastate rates, because the direction to the carriers is only to establish the same rate intrastate as it contemporaneously maintains interstate. In order to increase its 1-line intrastate rate it must have a contemporaneous 1-line interstate rate. This it does not have, and therefore there was no authorization to increase the 1-line intrastate rate of any of the 20 lines which have no interstate rate 1-line and perform no interstate service 1-line.

THE ORDER OF THE COMMISSION IS VOID BECAUSE IT IS INDEFINITE AND LACKS PRECISION IN RESPECT TO THE CARRIERS SUBJECT TO ITS TERMS.

In dealing with the above point the carrier appellees contend (c.58-62) that the Commission is not required to state definitely which carriers are subject to the terms of the Commission's order, relying on *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S., 563.

While it may be true that it is not necessary for the Commission to deal with each individual instance of discrimination when proceeding under section 13-(4) of the Act, the Commission is nevertheless not relieved from the responsibility of specifying the carriers and the traffic against which its order is directed. Counsel for the United States take the view (u.60) that the order is not indefinite but embraces all 1-line rates within the district, including those which are maintained by carriers who do not operate in 1-line service in interstate commerce.

Our own views as to this matter are recited at pages 105 to 107 of our original brief. In our judgment the order by its very terms does not apply to the 1-line rates of the North Western because that carrier, within the terms of the order, is not contemporaneously applying a higher 1-line rate to interstate traffic within the district. Nevertheless, the Chicago & North Western has relied on the order so as to escape the findings of the Illinois Commerce Commission which, if observed, would have required it to maintain its former 1-line rates.

If counsel for the United States are correct in their position, and the order does apply to the Chicago & North Western Railway, we then assert that it is invalid on the authority of the *Texas & Pacific Case* above cited.

NOTHING IS SAID BY APPELLEES WHICH RELIEVES THE COMMISSION FROM THE CHARGE OF HAVING DENIED APPELLANTS A FULL AND FAIR HEARING.

We have asserted (Br. pp. 72-82) that there is no evidence in this record as to the cost of switching intra-terminal traffic for a period subsequent to 1927; that in the six or seven years which have elapsed since that time there has been a substantial change in conditions which affect costs; that appellants petitioned the Commission for a further hearing and for an order directing the making of a cost study which would reflect present-day conditions; that the Commission denied such petitions, and that the denial thereof was such an abuse of discretion as to deprive the appellants of the full and fair hearing which is their right under the statute. In reply thereto appellees assert (u.32):

> "It will be noted that the abuse of discretion with which the Commission is charged is not that it denied hearing as to the effect of changed conditions on the reasonableness of rates."

And again (u.35):

> "Appellants' motion was not simply for a reopening to test the reasonableness of the rates in the light of changed conditions but was for the Commission to demand of the carriers a new cost study to be made on all 35 roads and in a particular manner."

It is true that the new study sought was to cover all roads within the district and was to be made for a sufficient length of time and at a time which would be representative. However that may be, the primary necessity for a new cost study and a new hearing based thereon, as appellants viewed it, was in the matter of changed conditions, 1933 as compared with 1926.

Appellants did assert to the Commission in their respective petitions for further hearing that there had been sub-

stantial changes in the conditions affecting the cost of carriage since 1926; that such changed conditions, if reflected in a present-day cost study, would show substantially lower average costs so as to indicate that what may have been reasonable in 1926 was not and could not be reasonable in 1933.

In the *Second Report* the Commission, referring to the appellants, said (R. 140):

> "They stated that the transportation, operating, traffic and competitive conditions have changed, those now obtaining and which will prevail in the future being substantially different from the conditions which existed during the past five years."

In *Missouri-K.-T R. Co.* v. *Kansas City Terminal Ry. Co.*, 198 I. C. C., 4, recently decided, the Commission, at page 8, said:

> "The Interstate Commerce Act carries out the theory that the action of the Commission should be responsive to changing conditions."

The absolute refusal to accord appellants a further hearing in the light of the circumstances in the instant cause is a clear abuse of discretion and renders the order invalid in accordance with the principles enunciated by this Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S., 248.

Appellees further take the view that the evidence introduced at the second hearing brought the record down to date so as to meet the purposes of appellants' motions and petition. (c.18, 42; u.18, 27, 35-6). The new evidence to which appellees refer is commented upon at pages 97 and 98 of that portion of the *Second Report* dealing with the formal complaint (R. 145-6) and is as follows:

The total operating expenses for all traffic of the eight switching carriers included within the cost study increased from $3.86 per car in 1928 to $4.04 per car in 1931. For the

same period for the same carriers the operating ratio *for all traffic* increased from 66.97 to 74.11 per cent. For the same switching carriers and including the Chicago River & Indiana Railroad, which was not included within the original cost study, there was a decrease over the same period in operating revenues of $10,500,000 and in operating expenses of $5,500,000. As the Commission states it, the carriers contended that there had been a decrease in tonnage which had resulted in increasing unit costs.

At the outset it should be noted that the Commission made no finding whatsoever on the basis of the evidence just summarized. In other words, there is no statement by the Commission in any portion of the *Second Report* that the costs either with respect to all traffic or with respect to the traffic immediately under consideration, i. e., the traffic switched locally within the Chicago switching district, that the costs were higher in 1931 or in 1933 than they had been in previous years.

When it is appreciated that the evidence referred to involved *all traffic* handled by the carriers, of which intra-terminal switching is a very minor portion (about 5 per cent the Commission states (R. 50)), it should be obvious that this evidence afforded no basis for a finding as to costs upon the traffic immediately under consideration.

As a matter of fact, if the more recent data referred to did bear upon the traffic involved in this proceeding, it would constitute a plain showing that the switching rates prescribed far exceed maximum reasonable rates. This is so because the very lowest switching rate prescribed is 3 cents per hundred pounds, minimum 60,000 pounds per car, which provides minimum revenue per car of $18.00. Such revenue is more than four times the average costs per car for all traffic handled by the eight switching carriers mentioned and such costs obviously can not serve to support the Commission's findings as to reasonableness either as of 1926 or as of 1933.

What is necessary in this case, if the appellants are to be given the full and fair hearing which is their right under the statute, is a cost study based on present-day conditions and confined to the intra-terminal switching traffic, separately stated for intrastate and interstate traffic with contemporaneous revenue studies. This matter of the time at which the cost study is to be made is of controlling importance regardless of details of the study or the carriers which make it.

The insistence of the Commission in its brief in resting every finding which it has made in this proceeding upon a cost study which is seven years old, and denominated by it as insufficient standing alone (R. 69), is in line with its refusal to require the carriers to make a cost study which will reflect present-day conditions; this confirms our showing of a clear abuse of discretion.

It should be noted that this case is not like *Georgia Public Service Commission, et al.* v. *United States*, 283 U. S., 765, 770, cited on page 45 of the brief for railroad appellees. In that case this Court said:

> "But the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings; and at those hearings the Georgia Commission and the Highway Board were represented. *Nearly 18 months had elapsed since the original order, but no evidence was offered at the supplemental hearing to show that conditions had so changed since the interstate rates were prescribed as to require reconsideration of the issue.* The appellants' objection to the procedure is unfounded." (Italics ours.)

How different is the situation in the instant case. Two years had elapsed since the original order, but the original order was based upon evidence which at the time of the Commission's *Second Report* was approximately six years old, applied against a traffic test seven years old. Before the Commission began to take testimony in the 13th section

case, *formal motions* were made pointing out the defects in the original cost study and particularly emphasizing its *ancient character*. These motions were denied prior to the hearing and when the request for cost study reflecting the then conditions was presented during the hearings in the 13th section case, they were all denied. (Br. 74.)

Under the circumstances disclosed in this case it is clear that the decision of this Court in the *Georgia Public Service Commission Case, supra,* not only is no authority for the contention made by the railroad appellees, but is complete affirmation of the righteousness of our contention that the Commission was required to reconsider the question as to the measure of the interstate rate for application as a yardstick in determining what order should be made, if any, under section 13-(4).

Grain Switching Rates

Section VII of our original brief deals with the grain switching rates. We there stated (p. 142) that the order of the Commission holding that the intra-state rates on grain switching constitute unjust discrimination against interstate commerce is void for the following reasons:

(A) It is based on its former order of July 31, 1931, which was void because there was no substantial evidence in the record to support a finding justifying any increases in the then existing interstate grain switching rates;

(B) It was based upon a misconception of the issues involved with respect to the grain switching rates and a misinterpretation of the powers delegated to it by the Interstate Commerce Act and was in direct violation of Section 15 (7) of the Interstate Commerce Act.

The brief filed on behalf of the United States and the Interstate Commerce Commission does not attempt to reply to either of the propositions which we contended for in our original brief, and the brief filed on behalf of the carrier appellees under Section VIII while not attempting

to directly answer the legal propositions urged by the Appellants, asserts that:

> "Under the facts, circumstances and the law applicable to this case, the Commission in its findings and order was not required to accord any different treatment to grain than to any other commodity." (c.70).

In our original brief we stated (p. 149) that:

> "The case was tried by the railroads upon the theory that all that was required of them was to prove what should be a general basis of rates throughout the Chicago Switching District; and if any individual road had commodities which it desired to be excepted from the general basis it was incumbent upon that individual road to show that such excepted commodity should be treated differently from the general basis."

Apparently the carriers still adhere to this theory, because nowhere in their brief do they make any claim that they have sustained the burden cast upon them by Section 15 (7) of the Interstate Commerce Act to justify increases in the grain switching rates, nor do they point to any evidence in the record to rebut the prima facie reasonableness of the grain switching rates (as they existed prior to the Commission's order of July 31, 1931) occasioned by the fact that they had been voluntarily established by the carriers and had been continued in effect over a long period of years.

In their opening paragraph (c.70) in discussing the grain situation, counsel for the carriers states:

> "The record shows that when the uniform all-commodity basis of rates was established for the first time in the Chicago switching district in 1911, grain was one of the commodities *omitted* from the agreement." (Italics ours.)

The choice of the verb "omit," which was also used in the statement of the case (c.20) carries the inference, although

perhaps unintentional, that grain was left out of the all-commodity basis because no particular attention was given to it at that time. In the abridged Webster's Dictionary the word "omit" is defined as follows: "To leave out; neglect; fail to mention."

As a matter of fact, grain was not neglected nor overlooked in the Lowrey Agreement, but from an examination of the agreement itself, which is introduced in evidence in this case, as Haynes' Exhibit 14, there appears a note on page 3 of the agreement as follows:

> "The foregoing industrial switching charges do not apply to grain, coal and coke. There is to be no change in the rates for switching on grain."

Here was a definite, affirmative statement with respect to the grain switching rates.

The second paragraph of the carrier appellees' brief under Section VIII, (c.71), states:

> "The record shows that the movement of grain between points within the Chicago switching district whether it be state or interstate, is the same as the movement of any other traffic within the district; that such movement has no connection, or is not related to the line-haul movement, but such movement is a merchandising, rather than a transportation problem."

It is a singular thing that this broad positive statement is not supported by any references to any page or pages of the record. The identical words were used in the carrier appellees' statement (c.20) and likewise no record citation is there made. It is true that both in the statement and in the argument (pp. 20 and 71) counsel refer to pages 692-695 of the first report of the Commission. (R. 56-59.) The pages of the Commission's report cited definitely do not substantiate the statement of the carriers above excerpted, and as a matter of fact the Commission's report is directly to the contrary.

The Commission's first report (R. 56) finds that the traffic analysis shows no movement of any grain within the Indiana section of the district. This is an important distinction. Moreover, as the Commission finds, the principal grain movement in September, 1926, consisted of corn in 2-line hauls, both interstate and intrastate in Illinois, although there is a substantial intradistrict movement of all grains in one, two and three-line hauls.

By reference to Exhibit 11-A it will be found that in September, 1926, the movement of all grain was:

	Interstate	Illinois Intrastate	Total
1-line	40	189	229
2-line	501	1,508	2,009
3-line	8	150	158
	549	1,847	2,396

The foregoing table shows that the grain movement in two-line hauls greatly exceeds the one-line or three-line hauls, while in the case of commodities generally the one-line hauls exceed the two-line hauls. (R. 43.)

With reference to the statement that the movement of grain between points within the Chicago switching district has no connection and is not related to the line-haul movement, but is a merchandising rather than a transportation problem, there is no foundation in the record for the statement. It is true that the Commission refers (R. 58) to the elimination of the intradistrict charge as a merchandising rather than a transportation problem. This recital is a mere conclusion of the Commission without any record support.

The Commission itself recognized that the record was without data as to the present two- and three-line grain rates from industry to industry upon which to base a conception as to the significance of the proposed change in rates on grain to the all-commodity basis, except what

might be gathered from the statement of revenues on the present and proposed all commodity basis (R. 56, 57), which is another way of saying that the record furnishes no basis, because a mere statement of what the revenue is on a given rate and what it would be on some other rate affords no basis as to what the rate ought to be.

An examination of the Commission's first report (R. 56-59) cited by appellees does not disclose any statement that even indirectly supports the statement of the carriers that the movement of grain between points within the Chicago switching district, whether it be state or interstate, is the same as the movement of any other traffic within the district. If the record had contained any such statement the attention of this court would have been called to it by the carrier's counsel. No such statement appeared in the record, so none could be cited. The fact that grain was excluded from the Lowrey all-commodity basis by affirmative action, and the further fact that grain has been carried as an exception to the all-commodity basis for approximately twenty years, is a clear indication that the movement of grain within the Chicago switching district differs from the movement of other traffic within the district, otherwise a special status would not have been accorded to it.

In the second paragraph on page 71 of the carriers' brief, as well as in the statement (c. 20, 21) the following statement appears:

> "Exhibit 7-A shows that 435 (432) cars moved in interstate transportation, within the district, on a two-line haul; that the average cost per car was $17.03; that the average revenue per car received by the carriers for such transportation was $10.68. That 1,130 (1,149) cars moved in two-line hauls, intrastate, within the district, in Illinois; that the average cost per car was $14.16 ($14.35); the average revenue was $10.23 ($10.47). That 31 (149) cars moved in one-line hauls, intrastate within the district, within Illinois; the average cost was $26.98 ($15.78) per car; the average revenue was $6.30 ($8.59) per car."

We have inserted in parenthesis certain corrections which are taken from pages 1 to 12 inclusive of Exhibit 7-A. The corrections which we have made in the carriers' statement are quite enlightening, because they show that instead of 31 cars moving in one-line hauls intra-state within Illinois, there were 149 cars, and the average cost on the intrastate movement of those 149 cars was $15.78 per car instead of $26.98, as set forth in the carriers' brief. Furthermore, the exhibit shows that the 31 cars referred to were handled in interstate traffic and not in intrastate traffic, and that the interstate cost was $26.98. The corrected statement also shows that whereas the average revenue on the 31 cars of corn interstate was $6.30 per car, the average revenue on the 149 cars of grain intrastate was $8.59, or practically one-third more than the revenue on the interstate cars. The importance of this correction is apparent, because the exhibit demonstrates the contention made in our original brief that the interstate costs were not the same as the intrastate costs and Exhibit 7-A proves this fact. The costs as shown by the carriers with reference to Exhibit 7-A are mere theoretical costs, and are subject to the criticisms which we made of the cost study in our original brief.

In the concluding paragraph of the carrier Appellees' brief, Section VII, (c. 72) it is stated:

> "The report of the Commission shows that careful consideration was given to the contention of the grain interests and upon the facts the Commission did not find any justification for continuing these exceptions in regard to grain, and therefore made no exceptions in this respect; but from the facts of record, as above pointed out, the Commission's order is a valid and lawful order."

Here again the carriers hark back to their mistaken theory of this case that the issue was whether or not grain should be included in an all-commodity basis. We again assert,

as we did in our original brief, that this was not the issue presented for determination, and we again affirm that the grain switching rates published by the individual carriers were "rates, fares or charges" within the meaning of Section 15 (7) of the Interstate Commerce Act, and that the carriers were legally compelled to assume the burden of proof of justifying any increases in the grain switching rates. This subject has been fully dealt with in our original brief, pages 148-156.

Conclusion

In our opening brief we sought to give this Court a complete picture of the case and to particularize and define the precise respects in which the order sought to be enjoined fails to meet the statutory requirements. In many respects appellees have failed to join issue with us, primarily, as we think, because of their inability to explain and excuse the errors committed by the Commission. They have preferred to present a mass of generalities, thus seeking to hide, by the gloss of their presentation, the lack of merit in their case.

For the reasons set forth in detail in our opening brief, we respectfully suggest that the order complained of is void and must be enjoined. The decree appealed from

should be reversed with directions to grant the relief prayed for.

Respectfully submitted,

OTTO KERNER,
Attorney General of Illinois,
Springfield, Illinois.
IRVIN ROOKS,
HARRY R. BOOTH,
Assistant Attorneys General of Illinois,
One La Salle St.,
Chicago, Ill.
Counsel for Illinois Commerce Commission.
PHILIP LUTZ, JR.,
Attorney General of Indiana
Indianapolis, Ind.
HERBERT J. PATRICK,
Deputy Attorney General of Indiana,
Indianapolis, Ind.
Counsel for Public Service Commission (Of Indiana).
HERBERT J. CAMPBELL,
33 North La Salle Street,
Chicago, Ill.
Counsel for Board of Trade of the City of Chicago.
JOHN S. BURCHMORE,
NUEL D. BELNAP,
LUTHER M. WALTER,
1522 First National Bank Bldg., Chicago, Ill.
Counsel for Acme Steel Company.

April 30, 1934.